Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-1169, 77-6097 and 77-6236

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN BAZZANO, PETITIONER

v.

UNITED STATES OF AMERICA

DAVID RANKIN GUFFEY, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN FRANKLIN MATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
ALAN J. SOBOL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	6
Conclusion	21

CITATIONS

Cases:

Blumenthal v. *United States*, 332 U.S. 539	9
Brady v. *Maryland*, 373 U.S. 83	6, 7
Bruton v. *United States*, 391 U.S. 123	17
Donnelly v. *United States*, 228 U.S. 243	17
Geders v. *United States*, 425 U.S. 80	12
Handley v. *United States*, 416 F. 2d 1160	15
Hoffa v. *United States*, 385 U.S. 293	12
Reyes v. *Wyeth Laboratories*, 498 F. 2d 1264, certiorari denied, 419 U.S. 1096	15
Ungar v. *Sarafite*, 376 U.S. 575	19
United States v. *Agurs*, 427 U.S. 97	7, 8
United States v. *Dotson*, 546 F. 2d 1151	7, 8
United States v. *Evanchik*, 413 F. 2d 950	8, 9
United States v. *Fendley*, 522 F. 2d 181	14
United States v. *Harris*, 409 F. 2d 77, certiorari denied *sub nom. Brown* v. *United States*, 396 U.S. 965	8
United States v. *Jones*, 554 F. 2d 251, certiorari denied, October 3, 1977 (No. 77-5102)	15

Cases—Continued — Page

United States v. *Kelley*, 349 F. 2d 720 — 20
United States v. *Leal*, 509 F. 2d 122 — 15
United States v. *Mardian*, 546 F. 2d 973 — 20
United States v. *Rosen*, 353 F. 2d 523, certiorari denied, 383 U.S. 908 — 11
United States v. *Sand*, 541 F. 2d 1370, certiorari denied *sub nom. Scully* v. *United States*, 429 U.S. 1103 — 14, 15
United States v. *Scott*, 524 F. 2d 465 — 7
United States v. *Smith*, 548 F. 2d 545, certiorari denied, 431 U.S. 959 — 19
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 — 11

Constitution, statutes and rules:

United States Constitution, Sixth Amendment — 15
Jencks Act, 18 U.S.C. 3500 — 6
18 U.S.C. 2 — 3
18 U.S.C. 1511 — 3
18 U.S.C. 1955 — 3
18 U.S.C. 1961 — 4
18 U.S.C. 3500(a) — 8
28 U.S.C. 1732 — 13, 15
28 U.S.C. 1732(a) — 13
Fed. R. Crim. P.:
Rule 6(e) — 10, 11, 12
Rule 8 — 20
Rule 33 — 6
Fed. R. Evid.:
Rule 403 — 12
Rule 803(6) — 13, 15
Rule 804(b)(3) — 16, 18
Rule 806 — 17, 18

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1169

JOHN BAZZANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-6097

DAVID RANKIN GUFFEY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-6236

JOHN FRANKLIN MATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] and the opinion of the district court (Pet. App. D) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1977. The petitions for a writ of certiorari in Nos. 77-6097 and 77-6236 were filed on January 24, 1978, and February 21, 1978, respectively, and are therefore out of time under Rule 22(2) of the Rules of this Court. A timely petition for rehearing in No. 77-1169 was denied on January 24, 1978 (Pet. App. 35a-36a), and the petition for a writ of certiorari was filed on February 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner Bazzano's post-trial motion for the court to inspect the government's files to determine whether the government violated its obligations to disclose exculpatory material.

2. Whether the district court erred in failing to grant a mistrial or to suppress the testimony of government witnesses on the ground that an FBI agent read to those witnesses each other's grand jury testi-

[1] Unless otherwise designated, "Pet. App." refers to the appendix to the petition in No. 77-1169.

mony prior to their testifying at trial, allegedly in violation of Fed. R. Crim. P. 6(e) (petitioners Guffey and Matz).

3. Whether the admission into evidence of adding machine tapes as business records violated Fed. R. Evid. 803(6) and 28 U.S.C. 1732(a) or petitioners' right of confrontation (petitioners Guffey and Matz).

4. Whether the evidence was sufficient to sustain petitioner Guffey's convictions.

5. Whether the admission of statements of a deceased co-conspirator violated petitioner Matz's right of confrontation.

6. Whether petitioner Matz was deprived of effective assistance of counsel by the trial court's denial of his motion for a continuance.

7. Whether the district court committed reversible error in refusing to sever petitioner Matz's trial from that of his co-defendants.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of operating an illegal gambling business, in violation of 18 U.S.C. 2 and 1955, and conspiring to obstruct state law enforcement relating to gambling, in violation of 18 U.S.C. 1511.[2]

[2] Co-defendants John Regis Ward, Peter Paul Orsini, and Thomas Poljak were also convicted of conducting an illegal gambling operation and conspiring to obstruct state law enforcement, in violation of 18 U.S.C. 2, 1955, and 1511. Co-defendants Joseph De Marco, Joseph Charles Yimin, Charles

Petitioner Bazzano was sentenced to seven years' imprisonment and a fine of $40,000. Petitioner Guffey was sentenced to four years' imprisonment and a fine of $15,000, with the provision that he be eligible for parole after six months' imprisonment. Petitioner Matz was sentenced to four years' imprisonment and a fine of $15,000.

The evidence adduced at trial is fully set forth in the opinion of the court of appeals. In sum, it showed that petitioner Bazzano operated a lottery (or "numbers game") in the towns of Clairton and Elizabeth, Pennsylvania. All the defendants who participated in the gambling business, except Bazzano, were public officials. These officials, including petitioners Guffey, Chief of Police of Clairton, and Matz, Mayor of Clairton,[1] accepted payments from the gambling operation in exchange for allowing the operation to continue without interference (Pet. App. 4a-5a).

The illegal gambling activities were extensively detailed at trial by Elizabeth Stanizzo, a former employee of the numbers business whose duties included receiving and recording the bets. Stanizzo had known Bazzano for 20 years, and her late husband had been Bazzano's partner in the business. She testified that

---

[1] Patrick Kellington, Francis Dattalo, Attilio Policastro, and Primo Victory Mollica pleaded guilty to the gambling and conspiracy charges and to conducting an enterprise by a pattern of racketeering activity, in violation of 18 U.S.C. 1961 *et seq.* Co-defendants Dominic Paul Serapiglia and George B. Hines were acquitted by the jury.

Bazzano ran the gambling operation, and the other defendants received payments from the operation (IX Tr. 170-195). Stanizzo further testified to a meeting, attended by her and her husband, petitioners Bazzano and Matz, and Gary Pastore, another employee of the gambling business, to determine who would "get" the numbers business in Clairton (IX Tr. 177-179). She also testified to having driven her husband on one occasion to deliver $1,500 to petitioner Matz (IX Tr. 180).

Stanizzo's testimony was corroborated by Andrew Moody, who owned part of the operation. Moody, whose daily duties included preparing summary tapes of bets and collecting bets from many numbers writers, testified that he had worked for Stanizzo's late husband in the gambling business. He related that each week, after he prepared the summary tapes of the week's numbers, he delivered them to Mr. Stanizzo (IX Tr. 69-77); that testimony corroborated Mrs. Stanizzo's testimony that each week, petitioner Bazzano would collect the weekly proceeds, review the weekly summary tapes with Mr. Stanizzo, pay Mr. Stanizzo, and take the remainder of the cash (IX Tr. 176-178). A former county detective, John Hammer, who related that he had accepted protection payments from numbers writers in the Clairton area, also corroborated Mrs. Stanizzo's testimony (VIII Tr. 26-40, 53-57).

The evidence also included adding machine tapes prepared by Moody, showing payments made to Matz and other defendants, including two notations show-

ing $150 payments to "Chief, Clairton," who at that time was petitioner Guffey (IX Tr. 115). In addition, the evidence showed that no gambling arrests were made in Clairton during the four-year period alleged in the indictment (VII Tr. 706).

ARGUMENT

1. Petitioner Bazzano's sole contention (Pet. 3) is that the district court improperly denied his post-trial request that the court inspect the prosecution's files to determine whether it had violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83, by failing to provide him with exculpatory statements and grand jury testimony of persons subpoenaed as government witnesses but not called to testify at trial.

Prior to trial Bazzano asked for "all exculpatory material" in the government's possession (Pet. 6). The government represented that it had no such material (Pet. App. 50a). At trial, following the direct testimony of each government witness, his or her prior statements were furnished to defense counsel in accordance with the requirements of the Jencks Act, 18 U.S.C. 3500. After his conviction, petitioner Bazzano moved for a new trial under Fed. R. Crim. P. 33 on the ground that some of the statements and grand jury testimony furnished him as Jencks material was allegedly exculpatory and arguing that this indicated that the government had failed to disclose other exculpatory statements of persons who had been subpoenaed as grand jury witnesses but not called to testify. In his motion for a new trial, petitioner requested the district court to conduct a hearing on the matter and to examine the government's files and determine whether such exculpatory material existed (Pet. 7). The government again represented that it possessed no exculpatory material, and the district court denied the motion (Pet. App. 50a).

The courts below correctly rejected petitioner's motion for a new trial and his requests that the district court conduct a hearing and search all of the government's files, presumably *in camera*, for exculpatory material. As this Court has recognized, *Brady* is not a discovery device. *United States* v. *Agurs*, 427 U.S. 97, 107; see also *United States* v. *Dotson*, 546 F. 2d 1151, 1153 (C.A. 5); *United States* v. *Scott*, 524 F. 2d 465, 467 (C.A. 5). *Brady* may require reversal of a conviction when it is ascertained, after trial, that the prosecution in fact possessed exculpatory information that it had a duty to disclose,[3] but *Brady* does not permit a defendant, either before or after trial, to search the prosecution's files in the hopes of discovering exculpatory material and thereby assisting the defense or establishing a *Brady* violation. And, as the courts of appeals have uniformly held, *Brady* does not require the trial court to examine the prosecution's files *in camera* unless the defendant has made some particularized showing—beyond a conclusory allegation—that the prosecution in fact

---

[3] As the Court stated in *Agurs*, *supra*, 427 U.S. at 103: "The rule of *Brady* v. *Maryland*, 373 U.S. 83 * * * involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."

possesses information that it had an obligation under *Brady* to disclose. See, *e.g.*, *United States* v. *Dotson*, *supra*; *United States* v. *Harris*, 409 F. 2d 77, 80-81 (C.A. 4), certiorari denied *sub nom. Brown* v. *United States*, 396 U.S. 965; *United States* v. *Evanchik*, 413 F. 2d 950, 953 (C.A. 2).

Petitioner Bazzano made no such showing. His allegation that the prosecution's file contained exculpatory statements is based entirely on the claim that statements disclosed to him under the Jencks Act were exculpatory and the argument that it may therefore be presumed that other undisclosed statements are also exculpatory. In the first place, however, the Jencks Act statements cited by petitioner are hardly exculpatory.[4] The sole statement referred to in the petition (Pet. 13) is the grand jury testimony of government witness Hammer to the effect that Hammer had once asked Mr. Stanizzo to ask Bazzano to lend Hammer some money and that several days later Mr. Stanizzo relayed a rejection of that request to Hammer, saying "John [Bazzano] said he is not in the business" (VIII Tr. 48). In context, since Bazzano was charged with gambling offenses, that statement has little, if any exculpatory value.[5]

---

[4] There was, of course, no obligation to disclose those statements until the witnesses testified at trial, even if they had been exculpatory. See 18 U.S.C. 3500(a); *United States* v. *Agurs*, *supra*, 427 U.S. at 112 n.20.

[5] In his brief below, Bazzano cited several other instances of what he claims to be exculpatory material furnished to him under the Jencks Act. These instances included a statement by co-conspirator Mandich to the FBI that he never worked for Bazzano; a statement by Petrulli before the jury that he never talked to Bazzano about the Clairton numbers business; and a statement by co-conspirator Sevcik to the FBI that he had no dealings with Bazzano. See Bazzano's Br. 6-7. In the circumstances of this case, those statements were hardly exculpatory. The indictment charged twelve defendants (six of whom pleaded guilty) with conducting the gambling business that Bazzano was also charged with operating, and the proof established that there were numerous other uncharged participants in the business and in the alleged conspiracy to obstruct state law, including Mandich, Petrulli and Sevcik. The fact (if true) that three of the co-conspirators did not personally have dealings with Bazzano would not establish any defense to the charges. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 559.

Moreover, even if the Jencks Act statements had been exculpatory, that would not constitute a showing that the prosecutor, contrary to his representation, possessed other exculpatory statements, and thus it would not require the district court to conduct a hearing on the matter or examine the prosecution's files itself. As the court of appeals stated in *United States* v. *Evanchik*, *supra*, 413 F. 2d at 953:

> [T]he assurance by the government that it has in its possession no undisclosed evidence that would tend to exculpate defendant justifies the denial of a motion for inspection that does not make some particularized showing of materiality and usefulness.

2. Petitioners Guffey (Pet. No. 77-6097, pp. 10-14) and Matz (Pet. No. 77-6236, pp. 4-6) challenge the district court's denial of their motions for a mistrial because government witnesses Moody and Stan-

izzo were allegedly read each other's grand jury testimony by the principal FBI agent who investigated the case, allegedly in violation of Fed. R. Crim. P. 6(e). The court of appeals and the district court correctly rejected that contention (Pet. App. 5a-13a, 49a).

The record shows that when Moody, who was testifying under a grant of immunity, took the stand, he asked to speak with the judge in chambers. There, with defense counsel present, Moody stated that a few days before he was to testify, FBI agent Fitzpatrick had read Moody's grand jury testimony to Stanizzo and read Stanizzo's grand jury testimony to Moody. Defense counsel moved for a mistrial or, in the alternative, that both Moody and Stanizzo "be dismissed as witnesses and not be called by the Government" (IX Tr. 63). The court denied the motions after oral argument, and Moody was allowed to testify.

On cross-examination, Moody testified that Fitzpatrick read selected pages of each witness's grand jury testimony in the presence of both witnesses (IX Tr. 133). He also testified that, in his opinion, Fitzpatrick attempted to influence his trial testimony with Stanizzo's grand jury testimony by attempting to insure that their stories would be the same (IX Tr. 133-134). Stanizzo's account differed from Moody's. She testified at trial that Fitzpatrick did not read any of her grand jury testimony at the meeting but, rather, told her that he did not have to read it to her because she knew what she had said.

She did, however, testify that he read from "some papers" to Moody in her presence.[6] After Stanizzo testified, petitioners again moved that her testimony be stricken on the ground that the meeting with Fitzpatrick violated Fed. R. Crim. P. 6(e)[7] and constituted prosecutorial misconduct. Petitioners also moved for a dismissal of the indictment on the same grounds. These motions were denied.

Assuming that the FBI agent disclosed Moody's and Stanizzo's grand jury testimony to each other in violation of Rule 6(e), the courts below correctly held that the admission of their trial testimony was not error. As the court of appeals noted (Pet. App. 9a), the principal purpose of Rule 6(e) is "to encourage witnesses to testify without fear of retaliation."[8] Another significant purpose is to prevent public dissemination of materials when no criminal

---

[6] Fitzpatrick testified that he "went over" Moody's testimony with him in Stanizzo's presence and "went over" Stanizzo's testimony with her in Moody's presence (X Tr. 45).

[7] That rule provides in pertinent part:

> Disclosure of matters occurring before the grand jury * * * may be made to the attorneys for the government for use in the performance of their duties. Otherwise * * * [an] attorney * * * may disclose matters * * * only when so directed by the court * * *.

[8] Accordingly, it has generally been held that the prosecutor may disclose a witness's grand jury testimony to the witness himself for purposes of refreshing his recollection. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 233; *United States* v. *Rosen*, 353 F. 2d 523, 524 (C.A. 2), certiorari denied, 383 U.S. 908.

charges result from the grand jury's investigation. Since the objectives of Rule 6(e) relate to the integrity of the grand jury's proceedings and not to the trial itself, it follows that a violation of the Rule supplies no basis for suppression of a witness's trial testimony. Accordingly, it is not surprising that there have been no cases applying the suppression remedy to disclosures of grand jury testimony in violation of the Rule.

Thus, the prosecution's alleged use of grand jury testimony to "shape" a witness' trial testimony does not implicate Rule 6(e), as petitioners contend, but rather involves the general ethical prohibitions against coaching witnesses. While there may conceivably be circumstances where evidence of improper coaching would warrant the district court's suppression of a witness's trial testimony under Fed. R. Evid. 403, the general rule is that evidence of coaching affects the credibility, not the admissibility, of testimony, and is a matter for the jury to resolve. See *Geders* v. *United States*, 425 U.S. 80, 89-90; *Hoffa* v. *United States*, 385 U.S. 293, 311.

The circumstances of this case demonstrate that the district court correctly declined to suppress Stanizzo's testimony and correctly permitted the jury to weigh the evidence of the alleged coaching for its bearing on her credibility. First, as the court of appeals noted (Pet. App. 11a), the record reflects that Moody was hostile to the government and "was using this incident as a convenient way to avoid testifying and to avoid implicating his friends." Second, as the

district court found, the testimony of Moody and Stanizzo about the incident varied significantly, and "all the circumstances militate against any inference that the testimony of Moody and Mrs. Stanizzo was 'shaped' * * *" (Pet. App. 49a-50a). Third, all of the circumstances concerning the incident were presented at length to the jury on cross-examination. Finally, as the court of appeals noted (Pet. App. 13a), the admission of Stanizzo's testimony was unlikely to have significantly prejudiced petitioner Matz (she did not testify about petitioner Guffey), since there was ample independent evidence of Matz's involvement in the operation.

3. Petitioners Guffey (Pet. No. 77-6097, pp. 4-8) and Matz (Pet. No. 77-6236, pp. 7-8) assert that the gambling business's adding machine tapes were not admissible as "business records" pursuant to Rule 803(6), Fed. R. Evid. and 28 U.S.C. 1732(a), the Business Records Act, and that their admission violated petitioners' right of confrontation.

a. There is no merit to petitioners' contention that the tapes were inadmissible under Rule 803(6) or 28 U.S.C. 1732(a) because Moody, who prepared them on the basis of information supplied to him by his employer, Mr. Stanizzo, claimed to lack personal knowledge of the underlying facts on which the information was based. Neither Rule 803(6) nor 28 U.S.C. 1732 specifies that a business record is admissible only if the person making the record has personal knowledge of the facts on which the record is based. Rule 803(6) requires only that the record

be "made at or near the time by, *or from* information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the * * * record" (emphasis supplied). See, *e.g.*, *United States* v. *Sand*, 541 F. 2d 1370, 1377 (C.A. 9), certiorari denied *sub nom. Scully* v. *United States*, 429 U.S. 1103; *United States* v. *Fendley*, 522 F. 2d 181, 184-185 (C.A. 5).

Those requirements were satisfied in this case. The evidence showed that Moody was part of the gambling operation and that his duties included preparing daily summary or composite tapes that listed the bets placed that day and disclosed the actual payments made to the public officials involved. Moody compiled a weekly master tape that contained notations about net cash coming in and expenses being paid out (IX Tr. 69-70). He made the notations on the tapes based on information supplied to him by Mr. Stanizzo, Bazzano's business partner in the gambling operation and Moody's superior (IX Tr. 71, 156; Pet. App. 42a-43a). Weekly, Moody delivered his master tapes and all money collected to Mr. Stanizzo; petitioner Bazzano would then collect the money and review the tapes (IX Tr. 76-77, 176-177). As a government expert in gambling operations testified, Moody's adding machine tapes were similar to records kept by other numbers operations (VIII Tr. 72-95). This evidence regarding Moody's daily and weekly compilation of the tapes and Mr. Stanizzo's and Bazzano's weekly review of them established an adequate foundation

for their admission under both 28 U.S.C. 1732 and Rule 803(6). See *United States* v. *Jones*, 554 F. 2d 251, 252 (C.A. 5), certiorari denied, October 3, 1977 (No. 77-5102); *Reyes* v. *Wyeth Laboratories*, 498 F. 2d 1264, 1287 (C.A. 5), certiorari denied, 419 U.S. 1096.

b. There is no substance to petitioners' claim (Pet. No. 77-6097, pp. 4, 7-8; Pet. No. 77-6236, pp. 7-8), that the admission of the adding machine tapes violated their Sixth Amendment right of confrontation. It is well established that the admission of documents under the business records exception to the hearsay rule does not violate the Confrontation Clause. *United States* v. *Sand*, *supra*, 541 F. 2d at 1377; *United States* v. *Leal*, 509 F. 2d 122, 127 (C.A. 9); *Hanley* v. *United States*, 416 F. 2d 1160, 1167-1168 (C.A. 5).

4. Petitioner Guffey contends (Pet. No. 77-6097, pp. 8-10) that the evidence adduced at trial was insufficient to support his conviction. As noted in the Statement, however, the evidence at trial showed that during the four-year period alleged in the indictment, when petitioner Guffey was the Chief of Police of Clairton, no gambling arrests were made in Clairton, notwithstanding the demonstrated existence of a large gambling business whose operation was known to and protected by a number of public officials, including petitioner Matz (the Mayor of Clairton) and government witness Hammer, a county detective. In addition, the business records of the operation showed two payments of $150 to "Chief, Clairton." That evidence was sufficient to submit the issue of petitioner

Guffey's guilt to a jury, and the issue does not warrant review in this Court.

5. Petitioner Matz contends (Pet. No. 77-6236, pp. 8-10) that the admission of a statement that his deceased co-conspirator and confederate, Gary Pastore, made to FBI agent Fitzpatrick violated Matz' right of confrontation.

The record shows that the admission of the statements was not reversible error. On direct examination, Fitzpatrick testified that Pastore admitted being involved with Moody and Mr. Stanizzo "in the money end of the business, the collections and the payments of expenses," but Fitzpatrick made no reference to any payments to any defendants (X Tr. 43).[9] On cross-examination, counsel for petitioner Bazzano, attempting to impeach Pastore's credibility, questioned Fitzpatrick about an apparent inconsistency between the adding machine tapes, which indicated that Hammer received $150 per month, and a statement made by Pastore to Fitzpatrick, reflected in Fitzpatrick's interview notes, that Hammer received only $100 a month (X Tr. 44-47). Defense counsel then attempted to establish a motive for Pastore's statement to Fitzpatrick by suggesting that Pastore had made

[9] This testimony was introduced to corroborate other testimony by Moody, Stanizzo and others that Pastore had been involved in the collection and payment of expenses, and was admitted under Fed. R. Evid. 804(b)(3) as a statement by an unavailable (deceased) declarant that "so far tended to subject him to * * * criminal liability * * * that a reasonable man * * * would not have made the statement unless he believed it to be true" (X Tr. 37-42; Pet. App. 47a, n. 5).

a deal with the FBI and that as a result he would not be indicted (X Tr. 47-49). On redirect, the prosecutor, over Matz's objection, attempted to rehabilitate Pastore by showing he had made other statements consistent with the tape entries, one of which was that Pastore told Fitzpatrick that he paid Matz $1,500 per month.[10] The court admitted this evidence on the basis of Fed. R. Evid. 806, which provides that when the credibility of a declarant is attacked, that credibility may in turn "be supported, by any evidence that would be admissible for those purposes if the declarant testified as a witness."

Petitioner relies on *Bruton* v. *United States*, 391 U.S. 123, for his claim that the admission of Pastore's statements violated his right to confrontation. *Bruton* involved the confession of a co-defendant who refused to testify, which implicated both the co-defendant and Bruton and which the prosecution introduced in its direct case; it did not involve the statement of a deceased declarant which was introduced for the limited purpose, authorized by Rule 806, of rehabilitating the credibility of a declarant that the defense had attacked on cross-examination.[11] More-

[10] This answer was also consistent with notations made of payments to the "Mayor" of Clairton (Matz) and with Stanizzo's earlier testimony that her husband had paid Matz $1,500 (IX Tr. 108, 179-180).

[11] When *Bruton* was decided, federal law was clear that out-of-court statements against penal interests did not qualify for admission as an exception to the hearsay rule. *Donnelly* v. *United States*, 228 U.S. 243, 273. The Court therefore assumed that the confession was inadmissible against Bruton, and the

over, the statement at issue here was merely cumulative of other evidence establishing payments to Matz, including the notations on the tapes and the testimony of Stanizzo that her husband had paid Matz $1,500 and that she had been present at a meeting with Matz to determine who would have the gambling business in Clairton. Under the circumstances the additional admission of Pastore's statement, even if error, was harmless.

6. Petitioner Matz contends (Pet. No. 77-6236, pp. 10-11) that the trial court's refusal to grant him a continuance deprived him of effective assistance of counsel, because, he claims, a continuance was necessary in order to allow counsel to secure "expert evaluation of the prosecution exhibits and expert testimony concerning these exhibits" (*id.* at 11). The record is to the contrary. On March 8, 1976, the date set for the commencement of trial, the court was informed that Mr. Sullivan, appointed as petitioner's counsel on July 2, 1975, was hospitalized and uncertain about when he could resume petitioner's defense. Joseph Bonistalli was substituted

---

opinion focused principally not on the admissibility of the confession but on the efficacy of a limiting instruction. It is an open question whether the evidentiary assumption in *Bruton* has been affected by Rule 804(b)(3), which recognizes certain statements against penal interests as an exception to the hearsay rule. That question is not presented in this case because the challenged statement was admitted under Rule 806, not Rule 804(b)(3), and because the admission of the statement was in any event harmless.

as counsel, and the selection of the jury was postponed until March 9, 1976 (Pet. App. 51a). As the district court noted (*ibid.*), it was not until March 23, 1976, that any evidence was introduced at the trial linking Matz to the gambling business. Thus, the record plainly contradicts petitioner's contention that the late substitution of counsel prevented him from securing expert testimony. See, *e.g.*, *United States* v. *Smith*, 548 F. 2d 545, 548 (C.A. 5), certiorari denied, 431 U.S. 959.[12]

In any event, motions for a continuance are matters within the sound discretion of the district court, and its decision is reversible only upon a showing of an abuse of discretion. *E.g.*, *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591. Petitioner has cited no errors or inadequacies in his trial counsel's performance, and, as the district court found (Pet. App. 51a-52a) and petitioner concedes (Pet. No. 77-6232, pp. 11), "Mr. Bonistalli vigorously cross-examined government witnesses and otherwise actively participated in the proceedings." Accordingly, the district court was well within its discretion in denying petitioner's motion for a continuance.

7. Finally, there is no merit to petitioner Matz's contention (Pet. No. 77-6232, pp. 10, 11-12) that the trial court erred in denying his motion for a separate

---

[12] Alternatively, Matz contends (Pet. 11) that the district court should have granted his motion for a severance, proceeded with the trial of his co-defendants, and tried him later. As noted above, the record refutes any need for either a continuance or severance.

trial. Matz alleges that the disparity between the evidence against him and the evidence against the other defendants was so great that he was necessarily prejudiced by being tried together with his co-defendants.[13] As noted, the evidence showed that petitioner Matz, who was the Mayor of Clairton, participated in a meeting with Bazzano, the Stanizzos, and Pastore wherein it was decided that the gambling operation would be allowed to continue in Clairton without official interference in exchange for payments; that he received a $1,500 payment in the summer of 1972 from Mr. Stanizzo; and that he was listed on the business tapes of the gambling operation as receiving $1,500 per month. Petitioner Matz was thus not simply a marginal figure in the criminal scheme; he was one of a small core group that allowed Bazzano to operate freely in Clairton. Accordingly, this case is clearly distinguishable from *United States* v. *Kelley*, 349 F. 2d 720, 756-759 (C.A. 2), and *United States* v. *Mardian*, 546 F. 2d 973 (C.A. D.C.), upon which petitioner relies (Pet. No. 77-6236, p. 11), which held that severance should have been granted because a very thin case against one defendant was unfairly bolstered by "spill-over" from the proof against much more clearly culpable defendants.

---

[13] Petitioner Matz does not dispute that joinder of the defendants in this case was proper under the terms of Fed. R. Crim. P. 8(b), which allows joinder of co-defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
ALAN J. SOBOL,
Attorneys.

MAY 1978.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 264024 125